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Supreme Court of the United States

October Term, 1976
No. 76-266

ORWIN B. GRIFFIN, JR.,
Petitioner,

vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS, RICHARD V. ZURZ AND WILLIAM B. PIKE IN OPPOSITION

STEPHAN M. GABALAC
Prosecuting Attorney

WILLIAM E. SCHULTZ
Assistant Prosecuting Attorney

Summit County Safety Building
53 East Center Street
Akron, Ohio 44308
Telephone: (216) 379-5594

Attorneys for Respondents, Richard V. Zurz and William B. Pike

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STATEMENT OF FACTS

The lower court granted summary judgment for the Defendants in this action wherein Plaintiff alleged violation of his constitutional rights under 42 U.S.C. 1981 and 1983. The complaint involved the Plaintiff's claim that his divorce case was not properly handled in the state courts and that the state court did not have jurisdiction to enter

orders against him. The United States District Court ruled first, that there was no complaint under 42 U.S.C. 1981 because there was no allegation of racial discrimination and second, that no cause of action existed under 42 U.S.C. 1983 because the courts have judicial immunity acting within their jurisdiction or even in excess of jurisdiction and further, that to grant the relief requested by the Plaintiff would amount to a review of a state court's judgment and in fact, make the federal court a forum for an appeal from state court litigation.

The following is a summary of the essential facts:

On April 3, 1970, a divorce action was initiated against Plaintiff in the Court of Common Pleas of Summit County, Ohio. This action, hereinafter referred to as Case No. 282105, proceeded to trial before Judge Koledin on February 3, 1971. After five days of trial, but before its completion, Judge Koledin refused to continue. On November 9, 1971, Judge Koledin issued an Order stating that he had become ill and was, therefore, unable to continue the trial.

Judge Koledin did not resume the trial. In the November 9, 1971 Order, Judge Koledin set the case for hearing before Judge Swaim on December 13, 1971 and "(set) aside the testimony that was heard in the five days of trial . . ."

Plaintiff objected to Judge Swaim's continuing the case. Apparently when his objection was overruled, Judge Swaim continued the trial. The decision in the Appellate Court indicates that Plaintiff, or his counsel, stipulated that the record of the first five days of trial should be considered by Judge Swaim. Plaintiff denies this. In any event, Judge Swaim rendered judgment against Plaintiff in that case on *October 27, 1972.*

The complaint alleges that Swaim was not a Judge of any court at any time relevant herein. However, the Appellate Court, upon Plaintiff's appeal, found that Judge Swaim was retired but had been assigned to Summit County as a Common Pleas Judge by the Chief Justice of the Supreme Court of Ohio. *Griffin v. Griffin,* Case No. 7129, Court of Appeals, Ninth District of Ohio (August 14, 1973).

Before Judge Swaim entered judgment in the divorce case, he entered an Order dated August 4, 1971. Said entry ordered Plaintiff committed to the Summit County Jail for ten (10) days, commencing on August 9, 1971. This entry was also signed by Defendant Pike, as Referee for the Common Pleas Court of Summit County, Ohio. This entry recites that it resulted from a hearing on August 2, 1971, on the Plaintiff in that action's motion for an Order finding Plaintiff herein in contempt of court, and that Plaintiff herein having appeared, the matter was referred to a Referee for hearing. Plaintiff alleges that these recitations are false.

Defendant Calhoun, the counsel for Plaintiff's wife in the divorce action, allegedly prepared this entry as well as most of the other court orders for approval and signature by the judge.

The complaint alleges that the Order of Judge Swaim, issued on August 9, 1971, was not enforced for over three years, and that it was drafted and executed with knowledge of its illegality and for the purpose of intimidating Plaintiff.

On January 28, 1976, another judgment was rendered in Case No. 282105, this time by Defendant Judge Zurz. Plaintiff was therein ordered to pay his former wife $7,955.00. Judge Zurz also found that Defendant had not

served the ten days imprisonment ordered on August 4, 1971, and, therefore, issued a capias to the Sheriff of Summit County to apprehend and detain Plaintiff for ten days. This Order was allegedly entered with knowledge that the judgment entered by Judge Swaim was void. It is further alleged that Defendant was not served with a copy of this judgment entry until about March 14, 1975, and that such delay resulted from a deliberate attempt by Zurz and Calhoun to prejudice this Plaintiff's rights.

LAW AND ARGUMENT

Having appealed the judgment through the Ohio courts of appeals and to the Supreme Court of Ohio, the complainant is now seeking to go by way of the Federal District Court for a review of state proceedings under the guise of a civil rights action which is, in effect, an attempt to appeal to the Federal District Court.

This suit is divided into two main sections; one being for damages against the Defendants, and the other being for declaratory judgment to declare the state judgment void and to enjoin the Defendants from proceedings under said state judgment.

It is the contention of the Defendants, Judge Zurz and Referee Pike, that this action cannot be maintained for damages by reason of the doctrine of judicial immunity. The doctrine of judicial immunity applies also to quasi judicial officers such as referees. See *Scarrella v. Spannous,* 376 F. Supp. 857. Also, see *Kremer v. Stewart,* 378 F. Supp. 1195. Although the facts presented in the complaint are distorted, nevertheless, taking the statements made therein for the purposes of this motion, it is obvious that we have here a domestic relations case

in a state court where judgment was rendered, where error was alleged, and appeal taken and a final adjudication made on the appeal all the way through to the State Supreme Court and the United States Supreme Court. The subject matter was all within the jurisdiction of the Defendant Judge and Referee as shown by the complaint and the rules under which they were operating were the rules of the State of Ohio Supreme Court.

The defense of judicial immunity is very broad and has been continuously upheld by the United States courts. See *Bradley v. Fisher,* 80 U.S. 335 (1871). *Pierson v. Ray,* 386 U.S. 547 (1967). *Lynch v. Johnson,* 420 F.2d 818 (6th Cir. 1970). See also the decisions of the courts which hold that judges and quasi judicial officers cannot be held liable for damages under Section 1983 for acts performed while acting in a judicial capacity where there is jurisdiction. *Bradley, supra. Hilliard v. Williams,* 465 F.2d 1212 (6th Cir. 1972). *Bauers v. Heisel,* 361 F.2d 581 (6th Cir. 1960). *Lynch, supra. Manning v. Ketcham,* 58 F.2d 948 (6th Cir. 1932). *Robichaud v. Ronan,* 351 F.2d 533 (9th Cir. 1965). In connection with this, the Court in *Bradley* stated:

> ". . . (J)udges of . . . general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by

law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved . . . *Bradley, supra* at 351, 52."

It is clear from the facts pleaded that the judicial Defendants, Zurz and Pike, regardless of how they acted, were within the scope of their judicial functions.

Under no interpretation of the facts as pleaded would Defendants be liable in a civil rights action.

With reference to 42 U.S.C. Section 1981, this would not be applicable to this case since there is no allegation of discrimination against the Plaintiff relating to race.

Bradley v. Fisher, above, and *Pierson v. Ray* held clearly that the principle of judicial immunity was not abolished by Section 1983. The Supreme Court explained in *Pierson v. Ray,* as it had on prior occasions, that:

"(this immunity) is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. (*Scott v. Stansfield,* L.R., 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher . . .*)"

With reference to the Plaintiff's request for affirmative equitable relief declaring the state judgment void and for restraining orders against the Defendants, this form of relief cannot be granted in these circumstances. See U.S. District Court, Northern District of Ohio, Civil Action #C74-106, *Cochran v. Barbuto,* (Thomas, J.). Section 1983 should not be a device by which the federal courts are resorted to for appeals from state court litigation. Comity

between the federal and state courts would be violated by such a result. See *Younger v. Harris,* 401 U.S. 37 (1971). The judgment complained of here is now some three years old and has been appealed through all of the courts. Aside from the question of the lapse of an unreasonable time to discover this violation of the Plaintiff's civil rights, it must be remembered that this case is no longer before the original judges who heard the evidence, Koledin and Swaim, both deceased—Referee Pike, however, still survives. What the Plaintiff is attempting to do is to have the Federal District Court order the present Domestic Relations Judge not to enforce a judgemnt, which is a state judgment and res judicata. Obviously, this Court could not go behind Case No. 282105 and declare it null and void by virtue of the civil rights complaint filed in this Court.

In this action, under 28 U.S.C. 2201, there is no basis for judgment or injunction to resolve an actual controversy under the Civil Rights Act. See *Daniels v. Thomas* (Court of Appeals, Colorado), 225 F.2d 795, *certiorari denied,* 76 S. Ct. 303. There cannot be an appeal in the nature of review of state judicial proceedings by the Federal District Court under a purported civil rights action. See *Travelers Insurance Company v. Davis* (Court of Appeals, Pennsylvania, 1974), 490 F.2d 536.

The Civil Rights acts protect only those rights secured by the Federal Constitution and laws of the United States and not those which belong to citizens of the states (14 C.J.S. *Civil Rights Supplement,* page 21, paragraph 13). The judicial proceedings related to in the Complaint pertain only to the pleadings, hearings and orders of the state court. The state laws are applicable to all of the proceedings which are recited in the complaint. The question of substitution of judges, continuance of testimony, the

manner of conducting hearings, the hearing of motions and so forth are all matters governed by the state judicial rules and statutes and by the Rules of Superintendency of the Supreme Court of Ohio, of which judicial notice may be taken.

It is definitely established that the federal courts, under the provisions of 28 U.S.C.A. 2283, are forbidden from staying or enjoining pending state court proceedings except under specific statutory exceptions, none of which are alleged here. *Mitchum v. Foster,* 92 S.Ct. 2151, 407 U.S. 225, 32 L. Ed. 2d 705 and except where there is a clear violation of a Constitutional right. No such case exists here.

CONCLUSION

All of the actions of the Defendant Judges and Referees herein were judicial in character and within the jurisdiction of the Common Pleas Court. This has been reviewed by the Ninth District Court of Appeals and by the Supreme Court of Ohio and no error has been found. This is strictly a state judicial action. No federal constitutional rights were involved which require the intervention of a federal district court. All of the matters involved in Plaintiff's complaint are strictly within the jurisdiction of the state courts. Particular attention is drawn to the distinction made by the Federal District Court that a court is "tribunal" while the judge is the "officer" of the tribunal. The relief asked by the Plaintiff would amount to a review of the state court's judgment; therefore, the request for injunctive and declaratory relief was beyond the District Court's authority. "Section 1983 should not be a device for disappointed litigants to use in an attempt to make the federal courts a forum for appeals from state court

litigation," *Cochran v. Barbuto,* C74-106, Northern District of Ohio, 1974.

Respectfully submitted,

STEPHAN M. GABALAC
Prosecuting Attorney

WILLIAM E. SCHULTZ
Assistant Prosecuting Attorney

Attorneys for Respondents, Richard V. Zurz and William B. Pike